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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-397

BONELLI CATTLE COMPANY, a California corporation; COUNTY OF MOHAVE, a political subdivision of the State of Arizona,

Petitioners,

v.

THE STATE OF ARIZONA, THE STATE LAND DEPARTMENT, a Department of the State of Arizona; ANDREW L. BETTWY, State Land Commissioner of the State of Arizona,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of Arizona

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REPLY BRIEF FOR THE PETITIONERS

ELMER C. COKER
Luhrs-Central Building
Phoenix, Arizona 85004

LEONARD C. LANGFORD
Mohave County Attorney
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ERRATA

Two errors appear in petitioners' opening brief and one error appears in respondents' brief.

In the citations of petitioners' brief the index under Miscellaneous recites the Executive Order of May 15, 1976, the correct date being May 15, 1876. Also on page 11 of petitioners' brief under History of the Colorado River the figure "500 miles" appears in the fourth line from the bottom of the page which correctly should read "200 miles".

Appearing on page 44 of respondents' brief the word "after" appears in the fourth line under the conclusion which should read "before".

REPLY

We feel that all parties filing briefs herein have exhaustively stated, with authorities, their respective positions on the complex questions facing this Court. It is conceded by all that each state is free to adopt or make

changes:

> "either legislative or judicial, in its general rules of real property, including the rules governing the property rights of riparian owners. Nor are riparian owners who derive their title from the United States somehow immune from the changing impact of these general rules."

provided that such changes do not constitute a taking from the riparian owner of his land and improvements without paying for the privilege of doing so. *Hughes v. Washington*, 389 U. S. 290, 19 L. Ed. 2d 530, 88 S. Ct. 438 (1967) at 535 and 536.

We presume this Court intended to limit the exercise of this right to the grant made by *Pollard v. Hagan*, 3 How. 212, 11 L. Ed. 565 (1845) and later confirmed by the Submerged Lands Act, 43 U. S. C. §1301 et seq., to those submerged lands beneath the navigable stream up to the ordinary high water mark in the existing navigable channel and did not intend

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that these rights would extend beyond that point to cover large areas of exposed land whether the exposure resulted from natural causes or were man-made for the purpose of improving or controlling the navigable stream in aid of navigation purposes.

While it is recognized that Arizona became admitted into the union on an equal footing with the other forty-eight states, the history of Arizona's long fight for statehood discloses that over a long period of time the Congress of the United States for political reasons attempted to force its admission as a joint state with the Territory of New Mexico (or in other words, joint statehood). This proposition was resoundly defeated by the people of the Territory of Arizona and as a result of this refusal Congress apparently wrought its vengeance on the people of

the Territory of Arizona by enacting a very restrictive Enabling Act relating to federal land grants for both Arizona and New Mexico as a condition precedent to their admission into the union, which conditions were finally accepted by the people of Arizona by the adoption of Article X of their Constitution in 1910.

Whereas the Joint Resolution No. 8 of Congress, August 21, 1911, 37 U. S. Stat. 39, did on its face admit the Territories of New Mexico and Arizona into the union on an equal footing with the other forty-eight states, it restricted the equal footing status (see footnote 7, *Texas v. Louisiana, infra*) by the restrictive covenants of the Enabling Act relating to federal land grants. The people of Arizona in adopting their Constitution in conformity with the Enabling Act, particularly Article X thereof, in two

different sections stated in effect that all land transferred and confirmed to the State by the provisions of the Enabling Act including all lands granted to the State and all lands heretofore granted to the Territory of Arizona, *and all lands otherwise acquired by the State*, shall be held by the State in trust and disposed of in whole or in part only in the manner prescribed by the Enabling Act of the Constitution (Article X, ¶1, Arizona Constitution). To the same effect is section 9 of Article X of the Arizona Constitution relating to the sale or lease of such lands. Under these provisions it is clear that the legislature of Arizona is powerless to overrule the decisions of the Arizona Supreme Court and recognize the property rights of the owners of riparian lands along the Colorado River

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unless this Court holds otherwise.

Generally speaking, petitioners have no quarrel with the general principles of law stated by respondents in support of the two questions presented on page 16 of their brief. But the question is, do these general principles apply to Arizona because of the peculiar nature of the conditions under which Arizona was admitted to the union and the fact that every foot of land along the Colorado River at the time of statehood was owned by the United States except land that had been previously conveyed by the United States to private parties such as the Santa Fe grant in Arizona, which consisted of almost 42,000 acres bordering the Colorado River (see brief of Santa Fe Railroad, p. 1)? To apply the theory of respondents, if the federal government in rechannelling the

Colorado River had constructed the channelization works miles away from the river, Arizona could (and undoubtedly would) still claim title to the Bonelli and other shoreline lands under the doctrine of accretion as adopted and defined by the Arizona Supreme Court in addition to retaining ownership of the submerged lands under the new stream bed.

The State of California through its Attorney General has filed an excellent amicus curiae brief in support of the position of Arizona. However petitioners desire to point out there is a major difference between the law applicable to the State of California and the law applicable to the State of Arizona. In the first place California has the benefit of the Swamp Act, 43 U. S. C. 981 et seq. (particularly with reference to section 987).

Secondly, California by statute originating in 1872 has through its legislature acted on the subject matter:

> "The state is the owner of all land below the tide water, and below ordinary high water mark, bordering upon tide water within the state; of all land below the water of a navigable lake or stream; * * * ". Section 670, West's Annotated California Civil Code, Volume 7.

On the other hand Congress by the enactment of the Enabling Act specifically denied Arizona the benefits of the Swamp Act and Arizona was given other grants in lieu thereof (Section 25, Enabling Act). For over 60 years the legislature and the people of the State of Arizona through constitutional declaration have either deliberately or intentionally failed through its legislative processes to claim any portion of the Colorado River or its shorelands as it flows through Arizona.

It was not until almost 60 years after statehood and 40 years after the Colorado River was declared to be a navigable stream by this Court in *Arizona v. California*, 283 U. S. 423, 75 L. Ed. 1154, 51 S. Ct. 522 (1930) that Arizona through ex post facto judicial legislation as evidenced by the two *Bonelli* decisions laid any claim whatsoever to the riparian lands along the Colorado River, although its neighboring state of Nevada as early as 1921 (some 9 years before *Arizona v. California, supra*) did so by enacting Section 537.010, Nevada Revised Statutes, which provide:

> "All of the Colorado River within the state of Nevada, from the Arizona line on the North to the California line on the South, is hereby declared to be a navigable stream for purposes of fixing ownership of the banks and bed thereof, and title to the lands below the high water mark thereof is held by the state of Nevada, insofar as they lie within the state." (1:971, 1921; NCL, Section 1425).

California does make an error of fact in its brief at the bottom of page 2, viz., "at the time of the grant to Santa Fe, the property in question *was not riparian land along the Colorado River.*" While this statement might perhaps be technically correct at the present time, the undisputed fact is that all of section 3 east of the Colorado River at the time it was conveyed by the United States to the Santa Fe by patent dated November 5, 1910, was riparian (see Agreed Statement, Exhibit C, App. 16-17; Township Plat, Exhibit B, App.15).

The Solicitor General of the United States in his amicus curiae brief admits that the rule in *Hughes v. Washington, supra*, should apply and that federal law should govern; he believes that under the Arizona decisions they could be interpreted as affecting federal lands as well

as Indian lands, but he disagrees with the Arizona Supreme Court's statement that Arizona's title as against private persons is in no way controlled by the opinions in *United States* v. *Claridge*, 279 F. Supp. 87 (1967), 416 F. 2d 933 (1969) (page 2 of brief). However the Solicitor appears to reverse himself in that while admitting that the language in the Arizona decisions is not clear but on the other hand as he interprets them he concludes that there is no conflict between the federal rule and the Arizona rule. Apparently he does not concur with petitioners' and respondents' interpretation of the difference in conflict of the boundary lines established by *Claridge* and *Bonelli* and concludes that the boundary line established by both cases is the same (page 4, footnote 3 of brief). However this conclu-

sion we submit is not based upon the facts of record before this Court. The interpretation of the respective boundary lines by petitioners and respondents as established by *Claridge* and *Bonelli* are clearly supported by the following documentary evidence of record attached to the agreed statement of facts (App. 6), namely: 1950 Davis Dam Quadrangle, Exhibit J; Bureau of Reclamation Topographic Map, Exhibit E-1; USGS Topographic Map, 1902-1903, Exhibit K; 1960 Mosaic Aerial Survey Photo, Exhibit D; Aerial Photo of April 24, 1938, Exhibit H; Aerial Photo 1942, Exhibit I; Plat of Limited Dependent Resurvey of Sections 2 and 10, Exhibit G (p. 55 petitioners' opening brief).

The Solicitor further attempts to distinguish *Claridge* and *Bonelli* by stating that *Claridge* did not involve channelization, but he fails to point out that

Claridge involved the change of the main channel of the Colorado River as the result of the construction of Hoover Dam and other dams and levees and dykes designed to confine and improve the channel and control the flow of the river (279 F. Supp. 87 at 90,91). It is clear therefore that there is no realistic or legal distinction between the works done in *Claridge* by the federal government through its Bureau of Reclamation and the channelization work done by the Bureau of Reclamation in *Bonelli*.

In conclusion, the Solicitor incorrectly concludes that in Bonelli's complaint to quiet title it failed to raise any issue of the denial of riparian access to waters of the Colorado River and assert any claim of damages therefor. Under statutes of Arizona relating to quiet title actions such an issue is neither necessary nor germane to a quiet title action or com-

plaint because under the Arizona rule the context of plaintiff's complaint is limited to:

> "The complaint shall:
>
> "1. Be under oath.
>
> "2. Set forth generally the nature and extent of plaintiff's estate.
>
> "3. Describe the premises.
>
> "4. State that plaintiff is credibly informed and believes defendant makes some claim adverse to plaintiff.
>
> "5. Pray for establishment of plaintiff's estate and that defendant be barred and forever estopped from having or claiming any right or title to the premises adverse to plaintiff." (Section 12-1102, Arizona Revised Statutes.)

From a review of all the authorities cited by counsel in their respective briefs before this Court and the factual situation which is admitted to exist herein it would appear that a paraphrase of a law review article entitled Extending the Application of the Law of Accretions, Vol. 23, Ohio State Law Journal 771, 773, in reviewing

Michaelson v. Silver Beach Imp. Ass'n., 342 Mass. 251, 173 N. E. 2d 273 (1961), is most apropos:

> "If the Superior Court's (Arizona Supreme Court's) theory in the principal case were followed, the government (Bureau of Reclamation) could create accretion by dredging alone Lake Erie (Colorado River) and (Arizona) could claim title to the entire shoreline. Then all riparian owners would be deprived of access to navigable waters and thereby lose the greatest attraction possessed by riparian property. The theory of riparian property is to encourage, not frustrate, the development of private access to the sea (river). The instant case adheres to this doctrine and reaches a fair and just result."

The doctrine of gain and loss of title as a result of accretion is based upon the equitable doctrine that the riparian owner who suffers the loss of his land by accretive movements of a navigable stream should likewise gain his land back together with accretive additions when the movement is reversed. Here it is apparent that Arizona has never suffered loss by the move-

ment of the Colorado River but to the contrary now claims a gain of thousands of feet in some areas along the river as a result of such movement.

While Arizona through its legislative processes has never legislated on the subject matter by claiming ownership of the beds and banks and accretion rights of the Colorado River it has however by entering into Compacts with the States of Nevada and California establishing boundaries between the respective states impliedly recognized private titles to fee lands along the shoreline of the river and prescribed that they should not be disturbed as a result of the new boundaries established by the Compacts and ratified by Congress (see Section 5 of both Compacts). Laws of Arizona 1960, Chapter 69, Laws of Nevada 1960, Chapter 119, ratified by Congress June 16, 1961, Public Law 87-50, 75 Stat. 93; Laws

of Arizona 1963, Chapter 77, West's Cal. Ann. Gov. Code, Sections 175, 176, ratified by Congress August 11, 1966, Public Law 89-531, 80 Stat. 340. In the Bonelli land location the Arizona-Nevada boundary is from the center of the Colorado River as rechannelled by the Bureau of Reclamation.

Respondents in answer to petitioners' charge that the decisions of the Arizona Supreme Court constitute a taking of Bonelli's property without compensation and that the doctrine of sovereign estoppel should apply and bar the State at this late date from asserting title to riparian or shoreline lands along the Colorado River after so long a period of silence and inaction in asserting claim of ownership very briefly on pages 40 and 41 of their brief completely ignore

this Court's decision in *Hughes v. Washington, supra,* and restate the position of the Arizona Supreme Court in *Bonelli* on rehearing at page 1313, 495 P. 2d (Pet. App. B, pps. 2b-3b) "this argument seems to be economic rather than legal and therefore not controlling". Petitioners submit that the economic problems created by the decisions of the Arizona Supreme Court constitute a confiscatory ex post facto taking by the State of previously recognized property rights which have existed over the years thereby establishing a constitutional problem and, as above stated, leaving the legislature powerless to act by relief measures for the benefit of the owners of these lands as a result of the taking.

Respondents attack petitioners' position on the doctrine of equitable

estoppel on the limited grounds that in this particular case Bonelli apparently took title to the parcel of land in question with notice on August 12, 1955 (the date of the warranty deed to Bonelli, App. 14) that at some time in the future the State of Arizona might claim ownership of the land and lists the prescribed necessary elements of equitable estoppel.

While in the Bonelli case some of these elements possibly could be missing (although we do not so agree) nevertheless the fact is that it is admitted as a matter of fact before this Court by not only California but also Arizona, Santa Fe and even the Solicitor General that there are over 200 miles of river frontage land in Arizona alone, title to which is in jeopardy as a result of the Arizona Supreme Court decisions. Respondents state on

page 42 of their brief that because of the meanderings of the Colorado River it has always been difficult for Arizona to assert ownership to any particular lands because the State's ownership is "at the mercy of the river". Likewise the fee owners have been facing the same dilemma, particularly now that Arizona claims ownership to their lands some 60 years after statehood and 40 years after the Colorado River was declared a navigable stream by this Court in *Arizona v. California, supra.* The State could have, and it was its duty through legislative process to follow the steps of California, Nevada and other states, asserted such ownership thereby giving every person owning lands along the Colorado River as well as the federal government and Indians notice of its claim of ownership.

Since the writing of petitioners' and respondents' briefs the Ninth Circuit Court of Appeals on July 13, 1973, in the case of *United States of America v. Lazy FC Ranch et al.*, No. 71-2318, ____F. 2d____ (unreported at the date of this writing) applies the doctrine of sovereign estoppel against the United States even though it was acting in its sovereign capacity. Some of the language used by the Ninth Circuit Court is apropos to the situation which we have at hand:

> "We think the estoppel doctrine is applicable to the United States *where justice and fair play require it.* The Supreme Court applies this rationale in Moser v. United States, 341 U. S. 41 (1951). * * * The Court permitted the government to be estopped even though it was acting in its sovereign capacity because under the circumstances of the case, *to do otherwise would violate notions of 'elementary fairness'.* * * *
>
> "This court has also followed this rationale and permitted the estoppel

defense against the government in cases *where basic notions of fairness required us to do so.*

* * * *

"The Moser-Brandt-Schuster line of cases establish the proposition that estoppel is available as a defense against the government *if the government's wrongful conduct threatens to work a serious injustice* and if the public's interest would not be unduly damaged by the imposition of estoppel. * * * This proposition is true even if the government is acting in a capacity that has traditionally been described as sovereign (as distinguished from proprietary) although we may be more reluctant to estop the government when it is acting in this capacity. * * * ". (Ephasis supplied.)

We submit that in the interest of justice and fair play that the State of Arizona now at this late date after large areas of originally bare river frontage lands have been highly developed and improved by private capital is equitably estopped and barred from asserting its ownership to these lands and improvements once covered by the waters of the meander-

ing and unpredictable Colorado River.

In conclusion it would appear from a reading of the questions presented by petitioners and respondents and all of the briefs submitted by the parties and amici curiae covering these questions that out of the questions presented and as a corollary thereto there are five very important questions this Court must resolve in order to lead us out of the thicket of confusion that now exists:

(1) What is the extent of the grant to the states upon admission to statehood to the submerged lands of a navigable stream as expressed by *Pollard v. Hagan*, *supra*, and later the Submerged Lands Act, *supra*?

(2) When the purpose of this grant no longer exists because of the movement of the river, namely, access by the public

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(1) What is the extent of the grant to the states upon admission to statehood to the submerged lands of a navigable stream as expressed by Pollard v. Hagan, supra, and later the Submerged Lands Act, supra?

(2) When the purpose of this grant no longer exists because of the severance of the river, namely, access by the public

to the navigable stream through state ownership of the submerged lands thereunder, does the grant cease to exist on exposed land no longer required for such purposes?

(3) If this grant is unrestricted and provides the means of additional land acquisition, can the state establish its own boundary of ownership or must it follow a boundary prescribed by the federal courts?

(4) Can Arizona assert title to these large areas of exposed land which have reemerged and become exposed as a result of confining the channel of the navigable stream after remaining silent for almost 60 years:

(a) After these lands have been extensively developed and improved by bona fide owners whose title was derived from the federal government;

(b) After the owners of these lands have

paid taxes to the state and its legal subdivisions on the lands and improvements thereon throughout this entire period relying on the silent acquiescence of the state in recognizing their ownership,

without compensating the owners for not only the loss of their land title but their improvements placed thereon?

(5) Does the doctrine of sovereign estoppel apply to the State of Arizona after such a long period of time and is it thereby equitably estopped and barred from now claiming ownership of these lands and the improvements thereon by ex post facto judicial legislation?

CONCLUSION

It must be remembered that the decisions of the Arizona Supreme Court not only involve the Bonelli lands but also

admittedly hundreds of acres of highly developed land along the shoreline of the Colorado River, the ownership and usage of which has been recognized by the State of Arizona and the Counties of Mohave and Yuma since statehood by the assessment, levy and collection of taxes thereon, which petitioners submit constitutes a usage as stated by by this Court "of so great a length of time as to have acquired the force of law", *Texas v. Louisiana*, ___ U. S. ___, 35 L. Ed. 2d 646, 93 S. Ct. ___ (1973) at 653.

For the foregoing reasons we respectfully urge that this Court reverse the two decisions of the Supreme Court of Arizona and affirm the judgment of the trial court and the decision of the Court of Appeals. Otherwise, if this Court should refuse to reverse the Arizona de-

cisions and should affirm the Arizona Supreme Court decisions on any theory, it is clear that the legislature of Arizona, in view of the restrictive covenants in the Enabling Act and Article X of the Arizona Constitution, is barred from granting any relief to the owners of lands and the improvements thereon bordering the shoreline of the Colorado River.

Respectfully submitted,

ELMER C. COKER
Luhrs-Central Building
132 South Central Avenue
Phoenix, Arizona 85004

Attorney for Petitioner
Bonelli Cattle Company

LEONARD C. LANGFORD
Mohave County Attorney
Kingman, Arizona 86401

Attorney for Petitioner
County of Mohave

By ELMER C. COKER